BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between		
J.W. HEWITT MACHINE COMPANY		Case 37
and		No. 44831 A-4722
INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, LODGE NO. 1855		

Appearances: Previant, Go
the Union.
DiRenzo and Bomier, Attorneys at Law, by Mr. Howard T. Healy, P.O.Box 788
Neenah, Wisconsin 54957-0788, appearing on behalf of
the Company.

ARBITRATION AWARD

J. W. Hewitt Machine Company, hereinafter referred to as the Company, and the International Association of Machinists and Aerospace Workers, Lodge No. 1855, hereinafter referred to as the Union, are parties to a collective bargaining agreement, effective May 1, 1988 to April 30, 1991, which provides for final and binding arbitration of grievances. Pursuant to a Request for Arbitration the Wisconsin Employment Relations Commission appointed Edmond J. Bielarczyk, Jr., to arbitrate a dispute over the shift assignment of an employee. A hearing on the matter was held in Neenah, Wisconsin on February 6, 1991. Post-hearing arguments were received by the undersigned by April 1, 1991. Full consideration has been given to the evidence, testimony and arguments presented in rendering this Award.

ISSUES:

During the course of the hearing the parties were unable to agree on the framing of the issues and agreed to leave framing of the issues to the Arbitrator. The undersigned frames the issues as follows:

1. " Did the Company violate Article VII of the parties' collective bargaining agreement when it denied the grievant's request to change from second to third shift?"

   If yes,

2. "What is the appropriate remedy?"

PERTINENT CONTRACTUAL PROVISIONS:

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ARTICLE VII
Seniority

Section 1. Definition. Except as expressly modified in this Article, the word "seniority" as used herein shall be deemed to mean the right of priority of employment and other benefits described herein, and shall be deemed continuous from the first day of employment unless interrupted or broken by resignation, or discharge for cause.

Section 2. It is understood and agreed that in all cases of increase or decrease of forces, bumping and the choice of shift, the following points shall be considered, and where factors contained in subdivision 2 are relatively equal, length of continuous service shall govern. 1) Length of continuous service; 2) Experience, skill and ability. In the event a question arises as to the qualifications of an employee for a job under the conditions herein described, the matter shall be discussed with the shop committee to attempt to reach agreement. If agreement cannot be reached, the Company reserves the right to determine the qualifications, subject, however, to the grievance procedure outlined in this Contract. Choice of shift shall be on a three-month basis, and any change of shift shall be for a minimum of one (1) month, unless otherwise agreed to.

Section 3. As soon as reasonably possible after the consummation of this Agreement, the Company will prepare a seniority list of employees covered by this Agreement who have established seniority with the Company and a copy of such list of employees showing their seniority date, Labor Grade, Job Title and rate of pay per hour shall be delivered to the Union and at the end of each six (6) month period thereafter a like seniority list shall be submitted to the Union.

Section 4. All laid-off employees who have retained seniority with the Company as defined in Section 5 below shall be given five (5) working days' notice for recall, at the last known address of such employee. Any such employee failing to report to work pursuant to the terms of such notice shall be deemed to have terminated his employment with the Company unless good cause for not having reported for work is shown.

Section 5. Loss of Seniority. Seniority rights shall cease and an employee be removed from the records if:

A. The employee resigns;
B. He is discharged for just cause;
C. He makes a false statement in obtaining a

leave of absence;

D. He is absent for three (3) consecutive working days without notifying the Company;

E. He is laid off for one (1) year or one-half the accumulated seniority, whichever is the greater. Except that employees with less than one year of seniority shall be limited to one half of accumulated seniority.

Section 6. Employees retained in the employ of the Company after having served ninety (90) calendar days probationary period as provided herein, shall have their seniority start as of the first day of employment.

Section 7. All vacancies and new jobs shall be posted on the Company Bulletin Board no more than five (5) days after a vacancy occurs or a new job is created, and shall remain posted for five (5) days. The Bulletin will state the number of jobs to be filled, the location of the job, the rate of pay for each job to be filled, a description of the work required, Labor Grade and Job Title.

An employee shall have the right to bid on any and all jobs posted. All bids will be made in two (2) written copies; one of each shall be furnished to the Company and one to the Shop Committee.

The Bidder with the highest seniority shall be given preference in filling the vacancy or newly created job.

The Company will, within a fifteen (15) day period after posting, announce the successful bidder on the Bulletin Board, together with the seniority date of the successful Bidder. The posted vacancy or new job shall be filled by the successful bidder within a thirty (30) day period, following the announcement. A successful bidder in a higher Labor Grade shall not receive less than the second highest pay in the Labor Grade stated in the Job Posting. Except by mutual agreement of the Union and the Company, a successful bidder shall not receive more than the highest pay in the Labor Grade identified in the Job Posting.

In the event that no employee bids for a bulletined job, the Company shall have the right to fill the position by selection of a junior employee, or by hiring a new employee.

Section 8. Employees accepting change in job and failing to qualify or wanting to return to old jobs within a thirty (30) day period shall be returned to their former positions.

Section 9. Any successful bidder, after the

thirty (30) day probationary period, shall not be eligible to bid another job opening within the Company for a period of twelve (12) months following his acceptance on the new job assignment without specific Company approval.

Section 10. Subject to the provisions of this Article regarding loss of seniority, any employee promoted to a position exempted by this Agreement, in the event his services in the new position terminate, shall have the privilege of returning to his former position or its equivalent without loss of seniority for a period of four (4) years from such promotion.

Section 11. The service records of the employee shall be made available to the Union, upon reasonable notice, for the purpose of expediting the adjustment of grievances.

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ARTICLE XVI
General Conditions

Section 1. The management of the plant, the direction of the working force, hiring and discharging, increasing and decreasing the working force and all other rightful functions of management are recognized by the Union as rights vested in Management.

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ARTICLE XVII

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Section 2. The function of the arbitrator so appointed shall be to interpret and apply this Agreement. However, the arbitrator shall have no power to add to or to subtract from, or to modify, extend or delete any of the terms of this Agreement, or any Agreement made supplementary thereto, except by mutual consent of the Company and the Union.

BACKGROUND:

The Company is in the service business operating twenty-four (24) hours per day every day of the year. It maintains two plants in Neenah, Wisconsin. Plant One is located in downtown Neenah and Plant Two is located approximately one (1) mile away. Employes are in one (1) bargaining unit and only (1) seniority list is maintained. Plant One operates two (2) shifts, first and second, and Plant Two operates three (3) shifts. The Company also employs Perry Killian, hereinafter referred to as the grievant, as a grinderman. Initially the grievant had been assigned to Plant Two where he worked the second or third shift depending on the Company's workload needs. The grievant was transferred to the second shift at Plant One because of difficulties working with other employes. These difficulties ceased after the transfer.

The instant matter arose when the grievant requested to be transferred

back to the third shift at Plant Two by using his seniority to bump a less senior employe. The Company denied the request and thereafter the instant grievance was filed. The grievance was processed to arbitration in accordance with the parties' grievance procedure.

There is no dispute that prior to his transfer to Plant One the grievant had been involved in a personality dispute with another employe. No grievance was filed over the grievant's original transfer.

UNION'S POSITION:

The Union contends the Company violated Article VII by denying the grievant his choice of shift. The Union argues the language of Article VII is clear and unambiguous and extends the right of shift choice to senior employes. The Union asserts this language specifically identifies shift choice as an employe right where seniority governs unless the Company disputes the experience, skill and ability of an employe. The Union claims the Company contention that the use of the word "and" prior to "the choice of shift" was intended to join conjunctively shift choice with layoffs, recalls and bumping is a nonsensical interpretation of the agreement. The Union points out the last sentence of Section 2 of this provision regulates the frequency of shift choice to once every ninety (90) days. Such a sentence would be unnecessary if shift choice could only occur during bumping, layoff or recall. The Union concludes the choice of shift language should be read independently of any increase or decrease in the workforce or any bumping.

The Union also argues bargaining history as well as the practical construction given this provision support the Union's interpretation. The Union asserts Duane Armitage's testimony demonstrated that at the bargaining table the Company did not mention this clause in conjunction with layoffs and recalls. He further testified the Company proposed limitations on shift selection to a three (3) month basis with a minimum of one (1) on the new shift. The Union points out Armitage's testimony was unrebutted by the Company and asserts the new language was inserted into the agreement to soothe the Company's concerns that employes would shift too frequently. The Union argues such a proposal would be unnecessary if shift selection was limited as the Company claims.

The Union also points out three employes testified at the hearing that either they themselves or employes they knew had exercised shift choice with little or no relation to any layoff or recall. Reasons identified were demotions which is not identified in the collective bargaining agreement or efforts to return to their "home" shift after being bumped out of it. The Union also argues that the Company's own documents concerning posting for vacancies demonstrate the Company practice to honor shift choice by seniority. The Union stresses vacancies do not necessarily occur because of layoff, recall or bumping.

The Union contends the Company did not offer any rebuttal to any of the testimony regarding contract negotiations, the free practice of shift choice, or to the documentary evidence. The Union concludes the Company's case rest on an implausible interpretation of the agreement. The Union argues the agreement clearly gives employes the right of shift choice by seniority and this is supported by bargaining history and the practical construction of the agreement given by the parties' themselves. Here the Union points out the Company does not dispute the grievant's experience, skill and ability is not relatively equal to the employe the grievant is attempting to replace.

The Union also contends that the Company is prohibited by the agreement from using management's rights to deny an employe rights given to employes by

the agreement. The Union stresses Article XVI, Section 2, states ... "The rights outlined in Section 1 of the Article shall not violate any of the rights of the employes or the Union in the Contract." (Emphasis added). The Union concludes this express language prevents the Company from denying the grievant the use of his seniority rights in choosing his shift preference.

The Union also argues that the Company can not mask its actions by claiming that denying the grievant his shift choice is an incidental side-effect to a transfer. The Union claims the loss of shift choice is not a side-effect but an entire effect. Absent a business related reason to move the grievant to another plant the Company can not circumvent an employe's contractual rights. In effect the Company has disguised discipline for an isolated verbal altercation to deny the grievant his request to change to a shift that would bring him back to Plant Two. Yet the grievant has no access to dispute such a disciplinary action.

The Union points out that no employe may be disciplined without just cause. The Company's actions in attempting to avoid a disciplinary action fails to recognize that the grievant is entitled by the agreement to the formality of discipline so that he may properly challenge the charge against him. In effect, the Union argues, the Company has shifted the burden of proof by shifting to the grievant the obligation to demonstrate his lack of fault in the altercation with another employe. The Union asserts the transfer of the grievant was in effect a form of discipline. The Union argues the denial of a contractual right is not an appropriate substitution for formal discipline. The Union also points out the Company claim that no Plant Two, first shift employes will work with the grievant is unsupported by the record and further, that the grievant works at Plant Two at the Company's request in overtime situations on weekends and other occasions. The Union also stresses the Company's actions have in effect resulted in a pay cut to the grievant because of a loss of shift differential pay.

The Union would have the undersigned sustain the grievance, direct the Company to allow the grievant his choice of shift and make the grievant whole for any lost shift differential.

COMPANY'S POSITION:

The Company contends it properly transferred the grievant to Plant One. The grievant acknowledged at the hearing he had difficulty working with other grindermen at Plant Two. The duties of grindermen in the roll grinding process may involve several employes over multiple shifts. Therefore employes must work in a cooperative and reasonably business like manner. When the grievant worked in Plant Two there was turmoil because of his inability to work effectively with other employes. Such a matter does not fall within the Company's work rules and is not necessarily a matter of discipline. It is difficult to allocate fault or causation. The Company argues that in instances involving attitude or work problems transfer of employes may be necessary. The Company points out the grievant's transfer from Plant Two to Plant One was not grieved. Therefore at the time of the filing of the grievance the grievant was properly assigned to Plant One. The grievant made a request to change from Plant One, second shift to Plant Two, third shift. The grievant was not posting for a vacancy but wanted to take a different grinderman position held by a less senior employe. The Company asserts that the agreement does not allow for employes to use shift preference to change from one plant to another. The Company points out Article VII, Section 2, contains no language concerning plant location. However, Section 7 of the same provision clearly requires the Company to post a job's location when it announces a vacancy. The Company contends it has clearly retained the right to determine where a particular job is to be performed. The Company argues the Union is attempting to circumvent

the provisions of Section 7 because the Company has retained the right to determine where jobs are performed and employes do not have the right to determine the location of where they will perform their jobs unless they use the posting provision of the collective bargaining agreement. The Company asserts the Union's interpretation of Article VII, Section 2 is inconsistent with Section 7 and argues that a disputed contractual provision cannot be read in isolation but must be viewed as a whole. The two sections must be harmonized.

The Company also points out that the instant matter is the first time that an employe has attempted to use shift selection to change from one plant to another. The Company concludes that absent specific language in Section 2 the Company's interpretation of the collective bargaining agreement is more reasonable.

The Company also argues that allowing the grievant to change to Plant Two would disrupt production. The Company points out the other employes at Plant One posted for and selected jobs based upon their preference and seniority. The grievant was placed in Plant One because of his inability to get along with employes at Plant Two. The Company contends it should not be required to grant a shift change that would create turmoil in its main production facility. The Company argues it has the right to deny the grievant's request based upon his previous performance at Plant Two. The Company asserts that based upon practicality it can deny the grievant's request. The grievant was unable to perform with other grindermen, these grindermen are still employed at Plant Two, and the Company is under no obligation to take a risk to give the grievant the opportunity to disrupt the grinding operation at Plant Two.

The Company would have the undersigned deny the grievance.

DISCUSSION:

The record demonstrates that the issue herein is not limited to a request to exercise an employe's shift rights. The request made by the grievant by necessity also involves work location, i.e. an assignment to Plant One or Plant Two. The undersigned finds that how the grievant was originally assigned to Plant One is irrelevant. The assignment was not grieved and the grievant acknowledged at the hearing he was aware of the Company's rational for his assignment to Plant One when he was originally assigned there. The record also demonstrates that since the grievant's transfer to Plant One the grievant has on occasion in overtime situations worked at Plant Two. There is no evidence that the grievant had any problems working with employes during these overtime situations. Thus the record demonstrates that whatever problems the grievant may have had working with other employes at Plant Two, these problems have not surfaced when the grievant has again worked with employes at Plant Two. Therefore the undersigned finds no merit in the Company's contention that it is preventing work disruption when it denied the grievant's request. Particularly when it has been the Company who has requested the grievant to work overtime at Plant Two.

The record also demonstrates that there is not a third shift at Plant One. The instant matter is also the first time that a choice of shift question involves a change in work location. Article VII, Section 2, clearly states that seniority shall govern choice of shift if experience, skill and ability are relatively equal. The Company does not dispute that the grievant is at least relatively equal in experience, skill and ability to the third shift

employe the grievant desires to displace at Plant Two. Nor does the Company contend the grievant does not have greater seniority than the employe the grievant is trying to displace. However, as argued by the Company, work location is not an option identified in Section 2. Thus the Company has asserted, as there is no third shift at Plant One, the grievant cannot exercise his rights to choice of shift because such an exercise of rights would entail a change of work location. The undersigned agrees with this rationale. There is nothing within this provision which would lead to the conclusion that employes have any rights in requesting transfers within the same job classification from one plant to another. Thus the most senior grinderman do not have seniority rights to work in the plant of their choosing. While within a work site a senior employe may have rights to the shift of their choosing, such rights would be limited to what shifts are in existence.

The undersigned notes here that one of the arguments raised by the Union is that the instant matter would be easily resolvable if the Company enacted a third shift at Plant One. However, Article XVI, Section 1, clearly invests in the Company the right to manage the plant. Therefore the undersigned does not have the authority to direct the Company to create a shift which does not exist. To do so would clearly infringe upon the Company's vested rights.

The undersigned also finds that the bargaining history of the parties' only serves to demonstrate that the instant matter is one of first impression. While it is evident that the parties added language to Article VII, Section 2, to limit choice of shift changes to a minimum of one (1) month, it is also evident that the parties have not discussed changes in work location when a request to change a work shift has been made.

The undersigned does find that the agreement is clear in that in a case of shift choice seniority shall govern provided employes are relatively equal in experience, skill and ability. What is not evident is how a case of shift choice comes into being. While the Union's witnesses where aware of instances where employes had excised shift choice rights, they were unsure as to whether some Company action preceded the exercise of these rights. The Company's arguments concerning Article VII, Section 7, demonstrate there is ambiguity concerning an exercise of shift choice and work locations. The agreement itself is unclear as to whether an employe can initiate a case of shift choice or whether some type of action by the Company is necessary, such as a layoff, recall or job posting. Absent such an action by the Company there is no evidence which would demonstrate that an employe has requested a shift change to exercise a right to choose a different shift. The undersigned does find that it is more reasonable to link a shift choice with an increase or decrease in the workforce and with bumping then to find the action of shift choice to be distinct as argued by the Union. The language linking these clauses together does not state "and/or" but states "and" choice of shift. Therefore the undersigned concludes the agreement does not permit the grievant to request a change of shift unless the request is preceded by an action of the Company which results in an increase or decrease in the work force and bumping. Had the Union presented clear evidence that employes in the past had exercised a shift change without such an action occurring then it would be clear that the choice of shift option could be implemented at the employe's whim, provided they had been on the shift for at least one (1) month. While the Company may have expanded the use of choice of shift to situations such as demotions as testified to by Joe Wilfling, there is also no evidence that the Company has ever expanded this right to selections of work location.

Therefore, based upon the above and foregoing, and the evidence, testimony and arguments presented, the undersigned concludes the Company did not violate the collective bargaining agreement when it denied the grievant's request to change shifts. The grievance is denied.

AWARD

The Company did not violate the collective bargaining agreement when it denied the grievant's request to change to the third shift.

Dated at Madison, Wisconsin this 12th day of September, 1991.

By Edmond J. Bielarczyk, Jr. /s/
Edmond J. Bielarczyk, Jr., Arbitrator